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No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOSEPH V. FISHER,

Petitioner,

—v.—

THE PENN TRAFFIC COMPANY, BYRON E. ALLUMBAUGH, RICHARD P. BRENNAN, KEVIN P. COLLINS, JAMES A. DEMME, MATTHEW GLASS, ROBERT HOCKETT, RICHARD D. HOLIHAN, JR., PETER L. ZURKOW, JOHN DOES NOS. 1-5, BERNADETTE RANDALL-BARBER AND JANE ROES NOS. 1-5,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should reconsider its decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), wherein it stated that Congress intended that relief for a breach of fiduciary duty pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a), be limited to relief for the affected employee benefit plan as a whole, which decision, in conjunction with the lower court's reading of this Court's decisions in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) and *Great West Life & Annuity Assurance Company v. Knudson*, 534 U.S. 204 (2002), leaves without a remedy an individual plan participant who, because of a breach of fiduciary duty that was particular to him, lost a plan benefit to which he was otherwise entitled under the plan's terms.

2. Whether this Court's decisions in *Mertens* and *Great West* bar make-whole relief for breaches of fiduciary duty under ERISA § 502(a)(3).

3. Whether Congress intended that ERISA categorically deny individual plan participants and beneficiaries meaningful make-whole relief against fiduciaries who breach the duties they assume under the Act.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 319 Fed. Appx. 34, 2009 U.S. App. LEXIS 6806 (2d Cir. April 2, 2009). The opinion and order of the United States District Court for the Southern District of New York is reported at 2007 U.S. Dist. LEXIS 10708 S.D.N.Y. Feb. 16, 2007).

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit, affirming the district court's opinion and order dismissing the complaint, was handed down on April 2, 2009. A timely petition for rehearing and rehearing *en banc* was denied on May 15, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES

ERISA § 409(a), 29 U.S.C. § 1109(a)

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may

> deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act

ERISA § 502(a)(2), (3); 29 U.S.C. § 502(a)(2), (3)

> (a) Persons empowered to bring a civil action. A civil action may be brought—
>
> . . .
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

STATEMENT OF THE CASE[1]

Petitioner Joseph V. Fisher ("Petitioner") is a former employee of defendant The Penn Traffic Company (the "Company"). At all times pertinent to this case, Petitioner was a participant in and beneficiary of the Penn Traffic Company Cash Balance Pension Plan (the "Plan"), with a vested right to benefits from the Plan. Pursuant to the

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[1] The factual allegations set fort herein are excerpted from Petitioner's district court complaint a copy of which is contained in the Appendix.

provisions of the Plan, Petitioner filed an application for benefits on August 15, 2003, electing to receive his benefits in a lump sum.

Although applications for lump sums were typically decided within two weeks, it was not until October 17, 2003 that the Administrative Committee of the Plan ("the Committee") denied Petitioner's application for a lump sum, but approved payments in the form of a monthly annuity should Petitioner so elect. Petitioner did not so elect but appealed the denial of the lump sum. Petitioner never received a response to his appeal.

Although the Committee had sole authority under the Plan to make benefit determinations, it did not do so. Instead, the Company's Board of Directors (the "Board") made, and the Committee adopted, the decision to deny Petitioner the lump sum he was entitled to under the Plan's terms.

The Plan was underfunded when Petitioner applied for benefits, and the Company had been informed that it might want to terminate the Plan so that the Pension Benefit Insurance Company ("PBGC") would assume the Plan's assets and liabilities. Nevertheless, at the time of his application and thereafter the Plan had adequate resources to pay Petitioner his lump sum benefit.

At its September 29, 2003 meeting, the Board passed a resolution to terminate the Plan. Nonetheless, the Committee processed other Plan participants' applications for benefits, including lump sum benefits, and caused the Plan to pay such

benefits, both before and after the Board's decision to terminate the Plan.

Upon the filing of an application for to terminate a plan, the PBGC does not immediately assume responsibility for the plan. Typically there are negotiations and even litigation over issues including the appropriate date of termination. Often, the PBGC pursues a claim against a plan sponsor, such as the Company, for a plan's unfunded liability.

The PBGC, which is prohibited from paying benefits in the form of a lump sum even if a plan provides for such a benefit payment, *see* 29 C.F.R. § 4022.7(a), did eventually assume the Plan's assets and liabilities. Hence, Petitioner cannot receive a lump sum benefit from the Plan and may only be entitled to a lower annuity than provided for by the terms of the Plan if his annuity is in excess of PBGC limits.

Petitioner filed suit pursuant to ERISA § 502(e), 29 U.S.C. § 1132(e), which grants district courts jurisdiction over claims brought under ERISA § 502(a), 29 U.S.C. § 1132(a). Petitioner alleged that the fiduciary defendants had breached their duties by failing to pay him a lump sum benefit. Fiduciaries are required to comply with the terms of the plan for which they act as fiduciaries. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Because the Plan fiduciaries failed to pay the lump sum benefit as required by the Plan's terms, they breached this duty.

Furthermore, Petitioner asserted that the fiduciaries denied his lump sum benefit in order to protect the Company's financial position, and thus violated ERISA § 404(a)(1), 29 U.S.C.§ 1104(a)(1), which requires fiduciaries to "discharge [their] duties solely in the interest of the participants and beneficiaries." Finally, Petitioner alleged that the Company (including the Board) engaged in a prohibited transaction by "deal[ing] with the assets of the [P]lan in [its] own interest or for [its] own account," *see* ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1), and that the defendant fiduciaries engaged in a prohibited transaction by acting "in [a] transaction involving the [P]lan on behalf of a party (the Company) whose interests are adverse to the interests of the [P]lan['s] participants and beneficiaries." *Id.* at (b)(2).

Petitioner has been damaged because he may no longer receive his benefits in a lump sum and because any annuity he receives from the PBGC may be lower than his accrued benefit because of the limits on PBGC payments.

Defendants moved to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that the relief requested was not available under ERISA §§ 502(a)(2) or (3). Defendants, therefore, asserted that, although Petitioner pled a valid claim for breaches of fiduciary duty and validly asserted damage resulting from those breaches, the courts were powerless to grant him any relief. The District Court accepted Defendants' argument and dismissed the claims and the Second Circuit affirmed

in a summary disposition, both based on decisions of this Court at issue herein.

REASONS FOR GRANTING THE WRIT

I. THE HISTORY OF ERISA LITIGATION CONCERNING CLAIMS FOR BREACH OF FIDUCIARY DUTY

Congress established four claims for relief for participants and beneficiaries under ERISA § 502(a), 29 U.S.C.:

> § 1132. Civil enforcement
>
> (a) Persons empowered to bring a civil action.
>
> A civil action may be brought--
>
> (1) by a participant or beneficiary--
>
> (A) for the relief provided for in subsection (c) of this section,[2] or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief

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[2] ERISA § 502(c), 29 U.S.C. § 1132(c), authorizes a suit against a plan administrator who has failed to provide information upon the participant's written request.

> under section 1109 of this title [ERISA § 409];
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

ERISA § 409(a), in turn, provides:

> § 1109. Liability for breach of fiduciary duty
>
> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title [ERISA § 411].

Thus, it would appear that a participant is authorized to sue under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), *inter alia*, for "such other equitable or

remedial relief as the court may deem appropriate" in the event that he is damaged by a breach of fiduciary duty.

In *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134 (1985) ("*Russell*"), the respondent had her disability benefits terminated for a period of time and then restored. While she eventually received all benefits due her, she sued for a breach of fiduciary duty under ERISA § 502(a)(2) seeking extracontractual and punitive damages for the delay in receipt of benefits. Despite the language in ERISA § 409(a) permitting the award of "such other equitable or remedial relief as the court may deem appropriate," the Court, in *dicta*, found § 409 to focus on relief for the plan itself rather than for participants who have been individually harmed by a breach of fiduciary duty. "Petitioner contends, however, that recovery for a violation of § 409 inures to the benefit of the plan as a whole. We find this contention supported by the text of § 409 . . . ." *Id.* at 140. The Court then held that Congress did not intend to provide "a cause of action for extracontractual damages caused by improper or untimely processing of benefit claims." *Id.* at 148.

Justices Brennan, White, Marshall and Blackmun filed a concurring opinion.[3] Importantly, the concurring opinion states:

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[3] Professor John H. Langbein refers to this concurring opinion as "functionally a dissent." John H. Langbein, "What ERISA Means by 'Equitable': The Supreme Court's Trail of Error in *Russell*, *Mertens*, and *Great-West*," 103 Columbia L. Rev 1317, 1340 ("Langbein").

> [t]his case presents a single, narrow question: whether the § 409 "appropriate relief" referred to in § 502 (a)(2) includes individual recovery by a participant or beneficiary of extracontractual damages for breach of fiduciary duty.
>
> . . .
>
> [S]ince § 502 (a)(3) already provides participants and beneficiaries with "other appropriate equitable relief . . . to redress [ERISA] violations," there is no reason to construe § 409 expansively in order to bring these individuals under the penumbra of "equitable or remedial relief."

Id. at 149-150 (Brennan, J., concurring). Thus, the concurring opinion emphasized two important points: (1) that the majority holding is limited to precluding relief for extracontractual damages under § 409; and, (2) that the relief available under § 502(a)(3) is as expansive as the relief available under § 409(a)'s provision for "equitable or remedial relief."[4]

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[4] An unfortunate aspect of *Russell* is that the respondent did not, in the alternative, seek a remedy under § 502(a)(3). Thus, the majority opinion in *Russell* did not address ERISA's remedial scheme as a whole. This piecemeal approach has, in Plaintiff's opinion, as well as in Professor Langbein's, *see* Langbein at 1340, led to the current situation, unintended by Congress, in which it is argued, almost always successfully, that breaches of fiduciary duty which cause monetary damage to one or more participants but not to the plan as a whole must be dismissed.

Mertens v. Hewitt Associates, 508 U.S. 248 (1993), is a 5 to 4 decision in which the Court was confronted with the narrow issue of whether compensatory damages were an available remedy in an action for knowing participation (by a nonfiduciary) in a breach of fiduciary duty under § 502(a)(3). The Court held that compensatory damages were not a § 502(a)(3) remedy because they are "legal" as opposed to "equitable relief," the sole form of relief provided by § 502(a)(3). In doing so, the Court decided that construing § 502(a)(3) to permit compensatory damages would effectively disregard the distinction between "equitable or remedial relief" in § 409(a) and "equitable relief" in § 502(a)(3). *Id.* at 258.

Justice White, in his dissenting opinion, stated:

> it is entirely reasonable in my view to construe § 502(a)(3)'s reference to "appropriate equitable relief" to encompass what was equity's routine remedy for such breaches -- a compensatory monetary award calculated to make the victims whole, a remedy that was available against both fiduciaries and participating nonfiduciaries. Construing the statute in this manner also avoids the anomaly of interpreting ERISA so as to leave those Congress set out to protect -- the participants in ERISA-governed plans and their beneficiaries -- with "less protection . . . than they enjoyed before ERISA was enacted."

> *Firestone* [*Tire & Rubber Co. v. Bruch*], 489 U.S. [101] at 114 [(1989)]. Indeed, this is precisely how four Justices of this Court read § 502(a)(3)'s reference to "appropriate equitable relief" in *Russell*.

Id. at 266-267 (White, J., dissenting).

Because *Mertens* concerned a claim against a nonfiduciary, it left open two questions: (1) whether claims for breaches of fiduciary duties that harm one or more but not all participants and beneficiaries (and therefore might not seek relief for "the plan as a whole") are actionable under § 502(a)(3); and, (2) if so, what relief is available?

The first question was answered in the affirmative by *Varity Corp. v. Howe*, 516 U.S. 489, 507-515 (1996). In holding that such claims are actionable, the Court stated "[w]e are not aware of any ERISA-related purpose that denial of a remedy would serve. Rather, we believe that granting a remedy is consistent with the literal language of the statute, the Act's purposes, and pre-existing trust law." *Id.* at 515.

The Court has not yet decided the second question. The closest it has come is its decision in *Great-West Life & Annuity Assurance Company v. Knudson*, 534 U.S. 204 (2002). *Great-West* involved a subrogation claim, not a breach of fiduciary duty claim.

In *Great-West*, the respondent had been injured in an automobile accident and had received

medical insurance payments from an ERISA plan insured by the petitioner. The plan had a provision that it had "the right to recover from the [beneficiary] any payment for benefits paid by the Plan that the beneficiary is entitled to recover from a third party." *Id.* at 207. The respondent had in fact secured such a recovery but the proceeds of the settlement had been apportioned principally to a special needs trust and attorney's fees.

The Court, in another 5 to 4 decision, citing its own decision in *Mertens* at 256 wherein it limited relief under § 502(a)(3) to "those categories of relief that were *typically* available in equity," 534 U.S. at 210 (emphasis in original), refined what it meant by "typically available in equity" to be: injunctions (but not for the payment of money), mandamus and equitable restitution (but not legal restitution). *Id.* at 214-216. Ultimately, the crux of *Great-West* is the Court's holding that the petitioner could only recover money under § 502(a)(3) if the money had been obtained

> "through means or under circumstances which render it unconscientious *for the holder of the legal title to retain and enjoy the beneficial interest*, equity impresses a constructive trust *on the property thus acquired* in favor of the one who is truly and equitably entitled to the same . . . ." (emphasis added) (internal quotation marks and citations omitted)[]

id. at 215-216 (citing *Harris Trust & Sav. Bank v. Salomon Smith Barney*, 530 U.S. 238, 250-251 (2000)), and "the money ... identified as belonging in

good conscience to the [petitioner] could clearly be traced to particular funds ... in the [respondent's] possession." *Id.* at 213 (citations omitted). Because no funds belonging to petitioner were in the respondent's possession, the Court denied relief under § 502(a)(3). While neither *Mertens* nor *Great-West* involved a breach of fiduciary duty claim, they have been uniformly cited as precluding monetary relief in such cases. *See, e.g., Eichorn v. AT&T Corp.*, 489 F.3d 590 (3rd Cir. 2007); *Cicio v. Does*, 321 F.3d 83 (2d Cir. 2003); *DiFelice v. AETNA U.S. Healthcare,* 346 F.3d 442 (3rd Cir. 2003).

Read together, *Russell, Mertens* and *Great-West* "yield[] a host of situations in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole monetary relief." *Aetna Health Inc.*, 542 U.S. at 222 (Ginsburg, J., concurring). Because of this effect, a "rising ... chorus" of judges and scholars have called for reexamination of ERISA's "unjust and increasingly tangled" enforcement scheme. *Id.* (citing *DiFelice*); Scott M. Aronson, *ERISA's Equitable Illusion: The Unjust Justice of Section 502(a)(3)*, 9 Emp. Rts. & Emp. Pol'y J. 247 (2005); Langbein, *supra*; Norman Stein, *Three and Possibly Four Lessons About ERISA That We Should, But Probably Will Not, Learn from Enron*, 76 St. John's L. Rev. 855 (2002). Indeed, as one member of this Court recently noted: "fresh consideration of the availability of ... damages under § 502(a)(3) is plainly in order." *Aetna Health Inc.*, 542 U.S. at 223 (Ginsburg, J., concurring).

The basis of Defendants' Motion to Dismiss herein was that *Russell* and *Great-West* bar any relief

to Petitioner. It is Petitioner's contention that in enacting ERISA Congress did not intend to, nor did it, so completely insulate fiduciaries that they would have no liability to a participant whose benefits were forfeited because of a fiduciary's breach of his duties and that make-whole monetary relief is available in such circumstances.

The decision below upholding dismissal of Petitioner's complaint violates the fundamental maxim that "Equity suffers not a Right to be without a Remedy," Richard Francis, Maxims of Equity 24 (London 1728) (cited in Langbein), and so defies ERISA's text and purpose by "let[ting] wrongdoing fiduciaries avoid meaningful liability for intentional harms." Stein, *supra,* at 874. Because pension law in general, and remedies in particular, are important topics in an aging society facing nearly unprecedented economic difficulties, this Court should ensure that ERISA fulfills its purpose "to protect...the interests of participants in employee benefit plans and their beneficiaries." ERISA § 2(b), 29 U.S.C. § 1001(b).

II. EITHER *RUSSELL* HAS BEEN WRONGLY APPLIED OR IT WAS WRONGLY DECIDED

A. *Russell* has been Wrongly Applied

As Point I, *ante*, demonstrates, the current state of the law would leave ERISA participants and beneficiaries such as Petitioner in an untenable position: damaged by a breach of fiduciary duty but without a remedy. But, as Point I also outlines, and

is more specifically discussed *post*, the decisions in *Mertens, Varity*, and *Great-West* establish that *Russell* is not as limiting as has been thought.

Section 409(a) may, obviously, be parsed so as to read in part: "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title . . . shall be subject to such other equitable or remedial relief as the court may deem appropriate[.]" This should, in and of itself, have confirmed that Russell stated a claim.

The Court in *Russell* nonetheless concluded that § 409(a) barred Russell's claim, finding that the language of § 409(a) indicated that Congress was focusing on relief for the plan as a whole as opposed to relief to an individual participant. *Russell*, 473 U.S. at 139 and 141 (footnotes omitted).

The Court then held that "[t]he six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted ... provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Russell*, 473 U.S. at 146 (emphasis in original).[5] "In contrast to the repeatedly emphasized purpose to protect contractually defined benefits, there is a stark

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[5] If the Plan herein had not been terminated, Petitioner would have sued under ERISA § 502(a)(1)(B) for "benefits due to him under the terms of the plan." Because the Plan has been terminated, and because all state laws claims are preempted, *see* ERISA § 514(a), 29 U.S.C. § 1144(a), Petitioner may only recover under § 502(a)(2) or § 502(a)(3).

absence -- in the statute itself and in its legislative history -- of any reference to an intention to authorize the recovery of extracontractual damages. *Id.* at 148 (footnote omitted).

What is clear from *Russell* is that the Court was drawing a distinction between a participant's right to sue for benefits which the Court viewed as sacrosanct, and a participant's right to sue for extracontractual damages suffered because of a delay in receipt of benefits, the only issue actually before the Court. The concurring opinion of Justice Brennan, joined in by Justices White, Marshall and Blackman, emphasizes this point as well as making clear that nothing in the Court's opinion forecloses extracontractual damages from being awarded to a plan under § 502(a)(2), *Russell*, 473 U.S. at 151 (Brennan, J., concurring), or to a participant under § 502(a)(3). *Id.* at 157. Thus, it is clear from both the majority and concurring opinions that the Court believed that ERISA provided adequate protection so that a participant or beneficiary could not lose a plan benefit because of a breach of fiduciary duty.

Russell has been cited routinely for the proposition that it is available only for claims that seek relief for the plan as a whole, regardless of whether the claim is for extracontractual damages or, as here, a plan benefit which the plaintiff would have received but for a fiduciary breach. *See, e.g., Coan v. Kaufman*, 457 F.3d 250, 262 (2d Cir. 2006); *Milofsky v. American Airlines, Inc.*, 404 F.3d 338, 342-3 (5th Cir. 2005). And, while it has been widely argued that *Great-West*, in conjunction with *Russell*, forecloses any relief in such circumstances, *Great-West* has, in

fact, effectively altered the import generally ascribed to *Russell*.

The majority opinion in *Great-West* quotes *Mertens*, 508 U.S. at 261, for the proposition that "'vague notions of a statute's "basic purpose" are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration.'" *Great-West*, 534 U.S. at 221. Thus, ERISA is to be interpreted literally. As such, the Court's determination in *Russell* that § 409(a) should not be read literally because of Congress' focus on a fiduciary's obligation to the plan must be reexamined in light of a literal reading of § 409(a), as follows:

1. Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach; and

2. Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary; and

3. Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon

fiduciaries by this title[6] shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

4. A fiduciary may also be removed for a violation of section 1111 of this title [ERISA § 411].

While this is the reading of § 409(a) that was rejected by the Court in *Russell*, given *Great-West's* admonition that one is to be guided only by the words of the statute and *Russell's* careful distinction between claims for extracontractual damages and claims for benefits under a plan, there can be no doubt that *Russell* is limited to a holding that a claim for extracontractual damages not on behalf of a plan as a whole is not "equitable or remedial relief" which a "court may deem appropriate" under § 409(a).

The concurring opinion in *Russell* makes this clear. "This case presents a single, narrow question: whether the § 409 'appropriate relief' referred to in § 502(a)(2) includes individual recovery by a participant or beneficiary of extracontractual damages for breach of fiduciary duty." *Id.* at 149 (Brennan, J., concurring). Thus, to the extent courts have extended *Russell's* reach to claims for plan benefits lost due to a fiduciary breach, they have

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[6] One of the duties imposed on fiduciaries is to act "in accordance with the documents and instruments governing the plan ...." ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). This obviously requires fiduciaries to pay benefits due under the plan. Defendants' failure to do so here was a violation of this provision. Thus, any "notion" that ERISA's fiduciary protections do not run to individuals, but only to plans, is incorrect.

relied on *dicta*. *Id.* at 150-151. Any language that reaches beyond that "narrow battlefield," *Mertens*, 508 U.S. at 255, is mere *dicta,* not binding precedent. *See Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701 (2007) (*dicta* not binding) (citing *Central Va. Community College v. Katz*, 546 U.S. 356, 363 (2006)). The notion that the *dicta* in *Russell* supported the rejection of a claim for benefits has now been dispelled by *Great-West.*

In *Carey v. Musladin*, 549 U.S. 70 (2006), the Court held that "clearly established federal law" refers to holdings, not dicta. *Id.* at 654, citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000). In deciding *Musladin*, "the Court gave the narrowest possible reading to its holding[] in *Williams.*" *Rodriguez v. Miller*, 499 F.3d 136, 140 (2d Cir. 2007).

"Leading by example, *Musladin* admonishes courts to read the Supreme Court's holdings narrowly and to disregard as dicta for habeas purposes much of the underlying logic and rationale of the high court's decisions." *Rodriguez* at 140. However, "holding" can have only one meaning for both habeas and all other purposes.

Accordingly, the holding in *Russell* stands only for the proposition that an individual damaged by the improper disruption of disability benefits is entitled to neither extracontractual nor punitive damages under ERISA § 409. *Russell* should not, therefore, impede this Court from finding that Petitioner has stated a viable claim for relief.

B. If Petitioner has not Stated a Viable Claim under either § 502(a)(2) or § 502(a)(3), then *Russell* Must be Overruled

It is a settled principle of statutory interpretation that, "[i]n reading a statute, the Court must not 'look merely to a particular clause,' but consider 'in connection with it the whole statute.'" *Dada v. Mukasey*, 128 S.Ct. 2307 (2008) (citing *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)). When applied to ERISA's enforcement provisions, this rule clearly demonstrates that the Act authorizes a remedy for any breach of fiduciary duty, and that such relief should include make-whole monetary remedies for individual participants.

> No statutory provision is written in a vacuum. Complex regulatory statutes, in particular, often create a web -- or, in the case of CERCLA, perhaps a maze -- of sections, subsections, definitions, exceptions, defenses, and administrative provisions. Thus, we examine the statute as a whole, including its purpose and various provisions.

Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 880 (9th Cir. 2001) (internal citations omitted). *See also* Sutherland, Statutes and Statutory Construction ("Sutherland") § 46 05 (5th ed. 1991) (a statute must be considered as a whole, not just the particular section in a vacuum). There can be no doubt that ERISA is a "complex regulatory statute . . . of sections, subsections, definitions, exceptions,

defenses, and administrative provisions." *Id.* *See also Russell*, 437 U.S. at 146, wherein the Court described ERISA as having an "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' *Nachman v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980)." Thus, in construing § 409(a), the Court should not look at that section "in a vacuum" but, rather, should construe it in light of ERISA's entire "Civil Enforcement" scheme, *see* ERISA § 502(a), 29 U.S.C. § 1132, in conjunction with the remainder of the "comprehensive and reticulated statute." This analysis should, of course, be informed by ERISA's remedial purposes. *Staten Island Rapid Transit Operating Authority v. Interstate Commerce Comm.*, 718 F.2d 533, 541 (2d Cir 1983) ("remedial legislation should be interpreted liberally"); Sutherland § 60.01 ("Remedial statutes are to be liberally construed to suppress the evil and advance the remedy.").

In ERISA's statement of policy, Congress made it clear that the purpose of ERISA was "to protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . and by providing for appropriate remedies, sanctions, and ready access to the Federal courts."[7] ERISA § 2(b), 29 U.S.C. § 1001(b). In order to assure these goals are met, courts, in construing ERISA, must remember that it "is remedial legislation which should be liberally

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[7] Indeed, early on it was stated that "[t]he primary purpose of the bill (that became ERISA) is the protection of individual pension rights ...." H.R. Rep. No. 93-533 (10/2/73), 2 Legislative History of the Employee Retirement Income Security Act of 1974, p.2348 (G.P.O. 1976) ("Leg. Hist.").

construed in favor of protecting participants in employee benefit plans." *Batchelor v. Oak Hill Med. Group*, 870 F.2d 1446, 1449 (9th Cir. 1989); *see also Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983) (ERISA is "designed to promote the interests of employees and their beneficiaries in employee benefit plans").

However, the majority in *Russell*, by its own admission, did not consider the statute as a whole; rather it interpreted § 409(a) in a vacuum. "Because respondent relies entirely on § 409(a), and expressly disclaims reliance on § 502(a)(3), we have no occasion to consider whether any other provision of ERISA authorizes recovery of extra contractual damages. Tr. of Oral Arg. 31-32." *Russell*, 473 U.S. at 139 n.5.[8]

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the Court addressed the question of the standard of review that a court should adopt when deciding a claim for denial of benefits under § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). The Court stated that "[a]dopting Firestone's reading of ERISA would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Id.* at 113-114. Because make-whole relief was available at common law to remedy a breach of

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[8] This footnote does, however, confirm that the Court's decision was limited to the denial of extracontractual relief under § 409(a) and that the Court has never addressed the question of a claim for breach of fiduciary duty for lost benefits under either § 409(a) or § 502(a)(3) or, for that matter, a claim for breach of fiduciary duty for extracontractual damages under § 502(a)(3), other than in the concurring opinion in *Russell*.

fiduciary duty ("we believe that granting a remedy is consistent with . . . pre-existing trust law[,]" *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996)), denying Petitioner a remedy herein would afford him less protection than he would have enjoyed before ERISA was enacted.

In reaching the conclusion that section 409 is limited to relief to the plan, this Court noted that the phrase "and shall be subject to such other equitable or remedial relief as the court may deem appropriate" must be read in the context of the earlier portion of section 409 which the Court found characterizes the fiduciary relationship as one "with respect to a plan" and speaks of the potential liability of a fiduciary to make good "to the plan" any losses "to the plan." Reading these sections as a whole, this Court concluded that the phrase "other equitable or remedial relief" must be read as limited to such relief for the plan. 473 U.S. at 141.

It is far more plausible and consistent with cannons of statutory construction to read section 409 in the following manner: "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title . . . shall be subject to such other equitable or remedial relief as the court may deem appropriate." Under this reading of section 409, equitable and remedial relief are not limited to relief to the plan, but are also available to participants and beneficiaries who have been individually harmed by a fiduciary breach.

This reading of section 409 is supported by its grammatical structure. Grammatically, the three clauses of § 409(a) are separated by commas and by the word "and." If Congress had intended a list of parallel remedies, as suggested by the opinion in *Russell*, it would have followed the ordinary grammatical rules for setting out a list, setting off the first clause with a comma, and listing the final "equitable and remedial relief" clause after the word "and" with no comma at all. "The rule here is that the comma is correct if it can be replaced by the word *and* or *or*." Lynn Truss, *Eats, Shoots & Leaves* (Gotham Book 2003) p. 83 (italics in the original). But Congress adopted a structure that is utterly idiosyncratic when it instead separated each clause of section 409 by both a comma and the conjunction "and." This indicates that Congress was setting forth a list of discrete remedies, not in any way dependent on the others. For example, in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), this Court construed the phrase "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose" as allowing interest on a claim independent of any agreement providing for reasonable fees, costs or charges. This Court stated:

> This reading is also mandated by the grammatical structure of the statute. The phrase 'interest on such claim' is set aside by commas, and separated from the reference to fees, costs, and charges by the conjunctive words 'and any.' As a result, the phrase 'interest on such claim' stands independent of

> the language that follows . . . The language and punctuation Congress used cannot be read in any other way. By the plain language of the statute, the types of remedies are distinct.

Similarly, the language and punctuation of section 409 mandate that the phrase "and shall be subject to such other equitable and remedial relief" provides for remedies that are distinct from the previous remedies outlined in section 409. Unlike the language describing the recovery of losses to the plan or restoration to such plan of any profits made by a fiduciary, the language authorizing equitable and remedial relief makes no reference to a plan.[9] Thus, section 409 must be construed to create more general remedies for fiduciary breaches than for remedies only to the plan.

To read section 409 as limited to relief "to the plan as a whole" effectively adds language to section 409(a) to say "and shall be subject to such other equitable or remedial relief *for the benefit of the plan as a whole* as the court may deem appropriate." *See Aronsen v. Crown Zellerbach*, 662 F.2d 584, 590 (9th Cir. 1981) ("It is consistent with the general principle of statutory construction that a court should not add language to an unambiguous statute absent a manifest error in drafting or unresolvable inconsistency."); see also SUTHERLAND STAT CONST § 47.38 (Insertion of words in a statute is permissible but "it is utterly

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[9] Nor does the heading of § 409 which is simply "Liability for a Breach of Fiduciary duty," not Liability **to a Plan** for Breach of Fiduciary Duty.

unwarranted unless the omission from . . . the text is plain.").

Section 409's reference to a fiduciary's duties "with respect to a plan" does not, as *Russell* suggests, indicate that Congress intended for section 409 relief to be limited to relief to the plan. Instead, that phrase is more naturally read to extend the fiduciary requirements, and thus the remedies for breach of those requirements, to all of a fiduciary's plan-related functions. *See* Webster's Third New International Dictionary 1934 (1986) (equating "respect to" with "regard or reference to" and "concerned with"). This Court has recognized that Congress intended for ERISA's fiduciary provisions to codify the strict duties of loyalty and care that traditionally applied to trustees under the common law of trusts. *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570-571 (1985). Although these provisions apply to a fiduciary's actions in managing the plan and its assets, under ERISA, as under the common law, the trustee's duties run directly to the beneficiary. *Russell*, 473 U.S. 134, 142 (1985) ("the fiduciary obligations of plan administrators are to serve the interest of the participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan"); *see also* 473 U.S. at 152 (Brennan, J., concurring) ("[I]t is black-letter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits."); Restatement (Second) of Trusts 170(1), at 384 (1959) ("The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."). There is, therefore, no

reason to read the phrase "with respect to a plan" as supporting an interpretation of section 409 that excludes relief to participants and beneficiaries.[10]

The phrase "equitable and remedial relief" should thus be construed to include make-whole relief to individuals who are harmed by fiduciary breaches. Because *Russell* held that section 409 did not provide a remedy for a participant alleging a fiduciary breach with respect to a benefit denial, this Court did not determine the meaning of the phrase "other equitable or remedial relief as the court may deem appropriate." Indeed, this Court expressly left open "any question concerning the extent to which § 409 may authorize recovery of extracontractual compensatory or punitive damages from a fiduciary by a *plan*." 473 U.S. at 144 n. 12 (emphasis in original). Accordingly, if this Court determines that §§ 409 and 502(a)(2) authorize a suit for individual relief, it will still be for a court to decide what relief is "appropriate" under the circumstances of each case.

Although this Court determined in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), that

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[10] The committee reports stressed the importance of giving participants the ability to protect their own interests as well as the interest of the plan. *See* S. Rep. No. 127, p. 29 ("without standards by which a participant can measure the fiduciary's conduct . . . he is not equipped to safeguard either his own rights or the plan assets"); *id.* at p. 27 ("the safeguarding effect of the fiduciary responsibility section will operate efficiently only if the fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general").

equitable relief does not include make-whole monetary relief (at least against a non-fiduciary), this Court should hold that make-whole relief is a form of "remedial relief" available under section 409. "Remedial relief" is not defined by ERISA, nor is the term commonly found in statutes or case law. "Remedial relief" must mean something other than "equitable relief," which the statute expressly authorizes, and it must mean something other than "legal relief," which Congress expressly omitted from section 502. "Remedial" is defined in Black's Law Dictionary as:

> 1. Affording or providing a remedy; providing the means of obtaining redress <a remedial action>. 2. Intended to correct, remove, or lessen a wrong, fault or defect <a remedial statute>. 3. Of or relating to a means of enforcing an existing substantive right; procedural <a remedial right>.

Although Black's Law Dictionary does not define "remedial relief," it does define "remedial law as:

> 1. A law providing a means to enforce rights or redress injuries. 2. A law passed to correct or modify an existing law; especially a law that gives a party a new and different remedy when the existing remedy, if any, is inadequate.

"Remedial relief" in section 409 should, therefore, be broadly construed as relief that corrects a wrong or redresses an injury, which should encompass make-whole relief to a participant or beneficiary who suffers an injury as a result of a fiduciary breach.

Such a reading would be consistent with the statute's primary purpose of protecting participants and beneficiaries, but would exclude such legal relief as was designed to punish or deter rather than to correct a wrong, notably punitive damages.[11]

In light of *Russell's* flawed statutory analysis as well as subsequent Supreme Court cases it can only be concluded that participants and beneficiaries who have been individually damaged by breaches of fiduciary duty may be granted an "appropriate" remedy under ERISA §§ 409(a) and 502(a)(2) and *Russell* should be overruled.[12]

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[11] To be sure, the legislative history supports the view that in using the word "remedial" Congress meant "legal." Contrary to this Court's description of ERISA's legislative history in *Russell* at 145-146, it is clear that the "equitable or remedial" language adopted by the conference committee and passed by Congress was derived from prior House versions of the bill which became ERISA. See H.R. 9824 (Aug. 2, 1973), 1 Leg. Hist. 731; H.R. 2 (Oct. 2, 1973), 2 Leg. Hist. 2288; H.R. 2 (March 4, 1974), 3 Leg. Hist. 3952. Thus, the statement in H. R. Rep. No. 93-533 (Oct. 2, 1973) that bill was authorizing "the full range of legal and equitable remedies available in both state and federal courts," quoted by the Court in *Russell*, *supra*, referred to the version of H.R. 2 of the same date which utilized the language "equitable or remedial." This was the language that was adopted in conference and from the legislative history it is apparent that both Houses understood the bill to provide the "full range of legal and equitable remedies." Nevertheless, Congress's failure to use the word "legal" in the statute itself supports the view that "remedial" means something other than "equitable" but less than "legal."

[12] All of the arguments set forth above concerning interpretation of statutes provide support for Petitioner's contention that *Great-West* informs *Russell* by requiring a literal construction of § 409(a).

III. *MERTENS* AND *GREAT-WEST* HAVE BEEN WRONGLY APPLIED

Mertens involved a claim by a plan for compensatory damages under § 502(a)(3) against a nonfiduciary for participation in a fiduciary breach. Thus, the question presented in *Mertens* was "whether ERISA authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty." *Mertens*, 508 U.S. at 251; *id.* at 249-50; *Great-West*, 534 U.S. at 215. The Court began its analysis by acknowledging that "at common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust" and that "money damages were available in those courts against the trustee" as well as against third parties. *Mertens*, 508 U.S. at 256.

After citing Pomeroy on concurrent jurisdiction, the Court concluded that "[s]ince all relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief available under § 502(a)(3) to 'equitable relief' in the sense of 'whatever relief a common-law court of equity could provide in such a case' would limit the relief not at all." *Id.* at 257. As a result, the Court held that "equitable relief" under § 502(a)(3) did not include money damages against nonfiduciaries who participated in a breach of trust. In so concluding, the Court noted that "[a]ll that ERISA has eliminated . . . is the common law's joint and several liability, for all direct and consequential damages

suffered by the plan, on the part of persons who had no real power to control what the plan did" – that is, nonfiduciaries. *Id.* at 262.

Notwithstanding the *Mertens* Court's careful distinction between nonfiduciaries and fiduciaries, courts after *Mertens* have stated that whether the defendant is a fiduciary or a nonfiduciary does not affect whether monetary relief may constitute appropriate equitable relief under § 502(a)(3). *See, e.g.*, *McLeod v. Oregon Lithoprint, Inc.*, 102 F.3d 376, 378 (9th Cir. 1996). This is inaccurate. First, as noted above, the *Mertens* Court premised its holding on the defendants' status as nonfiduciaries. Therefore, to the extent that any court held that the status of the defendants did not affect the question before the *Mertens* Court, they were wrong. Second, and more importantly, the relief available in equity against breaching fiduciaries was not a remedy at law, because the remedies of a beneficiary in that situation were exclusively equitable. Thus, while it is beyond dispute that equity courts had the power to award monetary relief to make a beneficiary whole for breach of trust, this remedy was not borrowed from the law courts. Rather, it originated in equity and depended on the status of the defendant because it arose out of the fiduciary relationship.

Likewise, the lower courts have misapplied *Great-West*. *Great-West* addressed the question whether § 502(a)(3) authorized an action against a plan beneficiary – that is, a nonfiduciary – to recover benefits paid to the beneficiary. 534 U.S. at 206. The Court rejected the argument that this relief was equitable on the facts of the case because (1) equity

rarely decreed "specific performance of a contract to transfer funds," *id.* at 211; (2) restitution at equity was limited to imposition of a constructive trust on specifically identifiable funds in the possession of the defendant, *id.* at 214; and (3) a trustee's power to offset money owed against a beneficiary's interest did not authorize an equitable cause of action to recover payment from other moneys. *Id.* at 219-20. None of this has anything to do with a trustee's liability in equity to make a beneficiary whole for a breach of trust.

In cases within equity's exclusive jurisdiction, arising out of express trusts, equity courts awarded remedies that in a non-trust case might be viewed as legal in nature: "It often happens that the *final* relief to be obtained by the *cestui que trust* consists in the recovery of money. This remedy the courts of equity will always decree when necessary." Pomeroy, A Treatise on Equity Jurisprudence ("Pomeroy"), § 158, p. 215 (5th ed. 1941). According to Pomeroy, a trust beneficiary "has the following *equitable remedies*: 'The beneficiary of a trust can maintain a suit . . . to compel the trustee to redress a breach of trust.'" *Id.* at § 1080, p. 229, n.15 (quoting Restatement of Trusts, § 199) (emphasis added). The trustee's liability on such a claim "is always sufficient for the complete indemnification and compensation of the beneficiary." *Id.* at p. 229. Thus, by definition, a remedy decreed in favor of a beneficiary against a breaching trustee was a non-legal remedy, because it came within the exclusive jurisdiction of equity, and law courts.

However, equity courts not only had exclusive equity jurisdiction, but also exercised jurisdiction concurrent with the law courts. *Id.* at § 181, p. 257. Concurrent jurisdiction allowed equity courts to adjudicate mixed equitable and legal matters as a single case. *Id.* This principle is known as the "clean-up doctrine." Dan B. Dobbs, Handbook on the Law of Remedies: Damages -- Equity -- Restitution, § 2.7, p. 83 (1973) (citing Pomeroy, §§ 231-42).

It was exactly assertion by Pomeroy regarding the equitable clean-up doctrine that the Court in *Mertens* quoted in explaining that at common law, "there were many situations – not limited to those involving enforcement of a trust – in which an equity court could 'establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.'" *Mertens,* 508 U.S. at 256 (quoting Pomeroy, § 181, p. 257); *Great-West,* 534 U.S. at 210 (stating that *Mertens* "rejected a reading of the statute that would extend the relief obtainable under § 502(a)(3) to whatever relief a court of equity is empowered to provide in the particular case at issue (which could include legal remedies that would otherwise be beyond the scope of the equity court's authority).").

Thus, *Mertens* and *Great-West* exclude from § 502(a)(3) any remedies borrowed from law courts pursuant to the clean-up doctrine. Remedies decreed against breaching fiduciaries, however, originated in and were exclusive to equity. There were no such remedies to be borrowed from the law courts, because the law courts lacked the power to grant any remedy for a breach of trust due to the equitable nature of

the fiduciary relationship. Restatement (Second) of Trusts, §§ 2, 197 (1959).

Given the lower courts' incorrect application of this Court's decisions, Petitioner is without a remedy - neither remedies borrowed from the law courts (*Mertens*) nor remedies specific to trust law (*Great-West*) were "typically available in equity," making non-injunctive "appropriate equitable relief" under § 502(a)(3) against a fiduciary a null set, or merely duplicative of the equitable relief available against a fiduciary under §§ 409(a) and 502(a)(2) which would make no sense. This cannot be the law. Like a constructive trust against a nonfiduciary, make-whole monetary relief against a breaching fiduciary was typically available in equity. Hence, the lower courts have misapplied this Court's decisions in *Mertens* and *Great-West* and impermissibly narrowed the scope of relief available under § 502(a)(3).

IV. THE LACK OF MEANINGFUL INDIVIDUAL RELIEF UNDER ERISA FOR BREACH OF FIDUCIARY DUTY IS A PRESSING CONCERN THAT THIS COURT, OTHER APPELLATE COURTS, AND SEVERAL PROMINENT SCHOLARS HAVE REPEATEDLY ADDRESSED.

Immediately after *Great-West*, judges and scholars alike began to criticize the impact of this Court's decisions on ERISA's remedial scheme. They have continued to do so since. These often colorful, always pointed, critiques focus on the fundamental

injustice that *Russell*, *Mertens*, and *Great-West* wrought. *See, e.g.*, *DiFelice v. AETNA U.S. Healthcare*, 346 F.3d 442, 454 (3rd Cir. 2003) (Becker, J., concurring) (describing ERISA's remedial scheme as a "Serbonian bog wherein judges are forced to don logical blinders and split the linguistic atom to decide even the most routine cases"). They lament the fact that two 5-4 decisions (*Mertens* and *Great*-West), and one unanimous decision with a four-Justice "functional dissent," Langbein, *supra*, at 1340, deny plan participants and beneficiaries a make-whole remedy for breach of fiduciary duty. They point out that this result flouts both justice and ERISA, disregarding Congress's intent to create a meaningfully enforceable duty, meant to be performed "solely in the interest of participants and beneficiaries." ERISA § 404(a), 29 U.S.C. 1104(a); *see Eichorn v. AT&T Corp.*, 489 F.3d 590, 591-94 (3rd Cir. May 31, 2007) (Ambro, C.J., concurring in denial of rehearing en banc); *Cicio v. Vytra Healthcare*, 321 F.3d 83, 106 (2d Cir. 2003), (Calabresi, C.J., dissenting); *Van Natta v. Sara Lee Corp.*, 439 F. Supp. 2d 911 (N.D. Iowa June 29, 2006); *see also* Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable Relief" under ERISA Section 502(a)(3)*, 39 J. Marshall L. Rev. 827 (2006) ("The preferred approach, advocated by this Article, is for the Supreme Court itself to resolve the judicial paradox of "equitable" relief under Section 502(a)(3)."); *Aronson*, *supra*; Langbein, *supra*; Stein, *supra*; Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. Pa. J. Lab. & Emp. L. 391 (2000).

This Country's population is aging. Indeed, according to the Center for Disease Control, "[t]he median age of the world's population is increasing because of a decline in fertility and a 20-year increase in the average life span during the second half of the 20th century .... In the United States, the proportion of the population aged [over] 65 years is projected to increase from 12.4% in 2000 to 19.6% in 2030." Public Health and Aging: Trends in Aging – United States and Worldwide, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5206a2.htm (last visited July 13, 2009). Furthermore, the United States is in the midst of a nearly unprecedented financial crisis. Not since 1929 has this Nation faced economic difficulties as severe as those of the past year. *See* David F. Schmitz: Professor Puts the 2008 Financial Crisis in Historical Perspective, https://quack.whitman.edu/content/magazine/in-their-words/schmitz (last visited July 13, 2009). This atmosphere of financial uncertainty, combined with the increasing age of the population, has the potential to produce disastrous effects on thousands of Americans' retirement savings. It is more important than ever that pension plan participants and beneficiaries have adequate remedies for breaches of fiduciary duty that cause them to lose some or all of their retirement funds.

The "rising ...chorus" has reached its crescendo; it is time for this court to "revisit what is an unjust and increasingly tangled ERISA regime." *Aetna Health Inc.*, 542 U.S. at 222, (Ginsburg, J., concurring).

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully requests that the Petition be granted and that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)" UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 2nd day of April, two thousand nine.

PRESENT:

HON. AMALYA L. KEARSE,
HON. ROBERT D. SACK,
HON. PAUL J. KELLY, JR.,*

Circuit Judges.

No. 07-1100-cv

JOSEPH V. FISHER,

Plaintiff-Appellant,

—v—

THE PENN TRAFFIC COMPANY, BYRONE E. ALLUMBAUGH, RICHARD P. BRENNAN, KEVIN P. COLLINS, JAMES A. DEMME, ATTHEW GLASS, ROBERT HOCKETT, RICHARD D. HOLIHAN JR., PETER L. ZURKOW, JOHN DOES, NOS 1-5, BERNADETTE RANDALL-BARBER, JANE ROES, NOS. 1-5,

Defendants-Appellees.

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* The Honorable Paul J. Kelly, Jr., of the United States Court of Appeals for the Tenth Circuit, sitting by designation.

Appearing for Appellant:

David S. Preminger,
Rosen Preminger & Bloom

Appearing for Appellee:

William H. O'Brien,
Cooley Godward Kronish LLP
(Jeffrey W. Lang, of counsel),
New York, NY

Appeal from a judgment of the United States District Court for the Southern District of New York (Harold Baer, Jr., *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be, and it hereby is, AFFIRMED.

Plaintiff Joseph Fisher appeals from a judgment of the United States District Court for the Southern District of New York based on its order of February 16, 2007, granting the defendants' motion to dismiss the case pursuant to Federal Rule of Civil Procedure 12(b) (6). We assume the parties' familiarity with the facts and procedural history of the case, and the issues on appeal.

This litigation arises from the denial of the request of the plaintiff, a participant in a cash balance retirement plan, to receive his benefits in a lump sum. The plaintiff contends that the defendants breached their fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* He therefore seeks equitable or remedial relief under ERISA § 502 (a) (2), 29

U.S.C.§ 1132 (a) (2), and equitable relief under ERISA § 502(a) (3), 29 U.S.C. § 1132(a) (3).

The district court correctly concluded that the plaintiff failed to state a claim under section 502 (a) (2), which allows parties to seek relief under ERISA § 409, 29 U.S.C. § 1109. The Supreme Court has held that "Congress did not intend [section 409] to authorize any relief except for the plan itself." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985); *see also Coan v. Kaufman*, 457 F.3d 250, 257 (2d Cir. 2006). Because Fisher seeks relief for himself as an individual, rather then on behalf of all or any part of the plan, he cannot bring a claim under section 502 (a)(2). "[Section] 502 (a) (2) does not provide a remedy for individual injuries distinct from plan injuries." *LaRue v. DeWolff, Boberq & Associates, Inc.*, 128 S. Ct. 1020, 1026 (2008). Fisher argues that the Supreme Court's decision in *LaRue* nonetheless clarified the scope of relief available under section 502(a) (2) and that in light of *LaRue*'s holding, we should reconsider the interpretation we gave that section in *Coan v. Kaufman*. We conclude that *LaRue* is inapposite here. *LaRue* explained that a participant in a defined contribution plan may maintain a claim for relief under section 502 (a) (2) if a fiduciary breach impaired the value of plan assets in the participant's individual account. *See LaRue*, 128 S. Ct. at 1026. Such harms are of the type contemplated by the statute's draftsmen, because they affect the plan. *See id.* at 1025. Here, however, the plan was a cash balance plan that did not involve individual accounts of the type at issue in *LaRue*. It is now defunct. Fisher seeks a lump sum payment for himself. Fisher's claim therefore cannot be construed as benefitting the plan.

The district court also correctly dismissed the plaintiff's claim under section 502(a) (3), which provides for equitable relief. Fisher seeks monetary damages, but contends that his claim is an equitable one because it involves a suit against a fiduciary, and such suits were, historically, within the exclusive jurisdiction of the courts of equity. Section 502 (a) (3) requires that both "the basis for the claim *and* the nature of the recovery sought be equitable." *Coan*, 457 F.3d at 264 (alteration and internal quotation marks omitted; emphasis in original). The plaintiff must therefore seek "a category of relief that was typically available in equity." Id. (alterations and internal quotation marks omitted). Monetary damages are not such a category. *See Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 221 (2002) ("[L]egal relief - the imposition of personal liability . . . for a contractual obligation to pay money" is not recoverable under section 502(a)(3).).

For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of the Court

By: _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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06 Civ. 5848 (HB)

JOSEPH FISHER,

Plaintiff,

—against—

THE PENN TRAFFIC COMPANY *ET AL.*,

Defendants.

OPINION & ORDER

Hon. HAROLD BAER, JR., District Judge:

Joseph Fisher ("Fisher" or "Plaintiff"), has brought the instant action pursuant to §§ 502(a)(2) and (a)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C.A. §§ 132(a)(2) and (a)(3) (West 2007). Plaintiff alleges that his former employer, the Penn Traffic Company ("Penn Traffic" or the "Company"), members of the Board of Directors Byron E. Allumbaugh, Richard P. Brennan, Kevin P. Collins, James A. Demme, Matthew Glass, Robert Hockett, Richard D. Holihan and Peter L. Zurkow (collectively, the "Board"), and the Administrative Committee of the Plan, including

member Bernadette Randall-Barber, (the "Committee") (collectively "Defendants") breached their fiduciary duty toward him in their refusal to pay a lump sum benefit as a participant in the Penn Traffic Cash Balance Pension Plan (the "Plan"). Defendants have moved to dismiss the case pursuant to Rule 12(b)(6) for failure to state a claim. For the reasons set forth below, the motion to dismiss this claim is GRANTED.

I. FACTUAL BACKGROUND

The following facts are taken from Plaintiff's Complaint as true for purposes of reviewing Defendants' motion to dismiss. *See Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991). Plaintiff is a former employee of Penn Traffic and "participant"[1] in their cash balance plan. He resigned in early August 2003, and on August 15, 2003, pursuant to the terms of the Plan, filed an application for a lump sum retirement benefit. Compl. ¶¶ 9-10. On September 29, 2003, the Board passed a resolution to terminate the Plan, but continued to process and pay benefits to plan participants. *Id.* ¶ 22. The Plan's assets and liabilities were subsequently assumed by the Pension Benefit Guaranty Corporation ("PBGC"). *Id.* ¶ 25. On October 17, 2003, the Committee informed Plaintiff that his request for a lump sum benefit payment was

[1] ERISA defines "participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C.A. § 1002 (7) (West 2007). *See Coan v. Kaufman*, 457 F.3d 250, 255 (2d Cir. 2006) (discussing the parameters of "participant" standing). The parties do not dispute Plaintiff's standing as a Plan "participant."

denied but that he was eligible to receive a monthly annuity. Plaintiff declined to receive the monthly annuity. *Id.* ¶ 11.

Thereafter, on July 31, 2006, Plaintiff filed the instant action and stated three claims for relief. First, Plaintiff alleges that Defendants breached their fiduciary duties imposed by ERISA § 1104(a)(1) when it denied his application for a lump sum benefit . *Id.* ¶ 26-27) and seeks relief pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). Second, premised on the same allegations, Plaintiff seeks relief under ERISA § 502(a)(3), 29 U.S.C § 1132(a)(3). Third, Plaintiff alleges that Defendants Penn Traffic and its Board, when it denied his lump sum application, violated ERISA §§ 406 (b)(1) and (b)(2), 29 U.S.C. § 1106 (b)(1) and (b)(2) (*Id.* ¶¶ 26-27), and seeks relief under ERISA §§ 502(a)(2) and (a)(3), 29 U.S.C. § 1132(a)(2) and (a)(3). Plaintiff seeks monetary damages in the amount of his lump sum benefit. *Id.* at 8), a declaration that the Defendants breached its fiduciary duty and the amount of money to which he is entitled (*Id.* at 7), and attorneys fees and costs. *Id.* at 8.

II. STANDARD OF REVIEW

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the movant must establish that the plaintiff has failed to "state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). In ruling on a Rule 12(b)(6) motion, this Court must construe all factual allegations in the complaint in favor of the non-moving party. *See Krimstock v. Kelly*, 306 F.3d 40, 47-48 (2d Cir. 2002). The Court's consideration is normally limited to facts alleged in

the complaint, documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken. *Allen*, 945 F.2d at 44. A motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Shakur v. Selsky*, 391 F.3d 106, 112 (2d Cir. 2004) (*quoting McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir. 2004)).

III. DISCUSSION

Defendants move to dismiss on the grounds that Plaintiff has failed to state a claim under ERISA §§ 502(a)(2) and (a)(3), 29 U.S.C.A. §§ 1132 (a)(2) and (a)(3) (West 2007) ("ERISA §§ 502(a)(2) and (a)(3)").

I will address each argument in turn.

A. Relief Under § 502(a)(2)

It is well established that plan participants may bring actions against plan fiduciaries for breaches of fiduciary duty. *See* ERISA §§ 409 and 502(a)(2); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). Plaintiff brings this action pursuant to ERISA § 502(a)(2), which authorizes four classes of party-plaintiffs—the Secretary of Labor, a participant, beneficiary, or fiduciary—to bring a civil action. ERISA § 409 provides, in relevant part:

> (a) Any person who is a fiduciary with respect to a *plan* who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter

> shall be personally liable to make good to such *plan* any losses to the *plan* resulting from each such breach, and to restore to such *plan* any profits of such fiduciary which have been made through use of assets of the *plan* by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C.A. § 1109 ("ERISA § 409") (emphasis added).

In *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), a beneficiary of an employee benefit plan filed a claim for improper processing of her disability benefits. Although Plaintiff was paid all of her benefits under the plan, she brought suit for extracontractual damages due to the injury she allegedly suffered from the plan administrator's improper refusal to pay her disability benefits. The question presented to the Supreme Court was whether ERISA § 502(a)(2) allowed a plan fiduciary to be held personally liable to a plan participant or beneficiary for damages. Justice Stevens, writing for a unanimous Court,[2] held that ERISA § 409, read in its entirety, refers to the relationship between the fiduciary and the plan, and more specifically, to the potential liability of the fiduciary to the plan. *Id.* at 140. In other words, the Court held that there is no private right of action for compensatory or punitive relief by an individual participant or beneficiary under ERISA § 502(a)(2). Nor may the final phrase in the section ("shall be subject to such other equitable or remedial relief as the court may deem appropri-

[2] Justice Brennan, joined by White, Marshall, and Blackmun, submitted a concurrence.

ate") be interpreted to enlarge that liability.[3] *Id.* at 140-41.

Defendants maintain that the Supreme Court's decision in *Russell* bars Plaintiffs claim for individual benefits because he seeks damages for his benefit alone and fails to allege any loss to the plan. Plaintiff responds that *Russell* has been applied too broadly and ought not be operative in a case such as this where plaintiff seeks recovery of benefits from a plan.

Plaintiff contends that the holding in *Russell* is fact-specific, distinguishable, and should be limited to the proposition that *extracontractual damages* that inure to the benefit of the individual as opposed to the plan are not "equitable or remedial relief" as the language is used in § 502(a)(2). Pl.'s Mem. in Opp'n to Defs' Mot. to Dismiss at 8 ("What is clear from *Russell* is that the Court was drawing a distinction between a participant's right to sue for benefits, which the Court viewed as sacrosanct, and a participant's right to sue for extracontractual damages suffered because of a denial of benefits, the only issue before the Court.") In support of his position, Plaintiff points to Justice Brennan's concurrence which emphasizes that *Russell* "presents a single, narrow question: whether the § 409 'appropriate relief' referred to in § 502(a)(2) includes individual recovery by a participant or beneficiary of extracontractual damages for breach of fiduciary duty." *Russell*, 473 U.S. at 149 (Brennan, J., concurring). Further, Plaintiff argues (based on cannons of

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[3] In so ruling, the Court explicitly left open the question as to whether extracontractual damages were available under any other provision of ERISA, including § 502(a)(3). *Russell*, 473 U.S. at 139, n.5.

statutory construction) that had the Court in *Russell* properly construed the provisions at issue within ERISA's broader civil enforcement scheme as well as its overarching remedial purpose, it would have reached a different result.

While creative, Plaintiff's arguments cannot defeat the plain language in the statute and what we find in the legislative history of § 502(a)(2) (and § 409)[4] First, ERISA §§ 502(a)(2) and 409 authorize *plan* participants to bring suit in a representative capacity on behalf of the *plan*, against a fiduciary of the *plan* to remedy that fiduciary's mismanagement of the *plan's* assets, and restore to *such plan* those losses suffered by the *plan* as a whole. *See Russell*, 473 at 144 ("The entire text of § 409 persuades us that Congress did not intend that section to authorize any relief except for the plan itself."); *Coan v. Kaufman*, 457 F.3d 250, 257 (2d Cir. 2006) (stating that such claims for breach of fiduciary duty may not be made for individual relief but must be brought in a representative capacity on behalf of the plan) (quoting *Russell*, 473 U.S. at 142 n.9); and *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993) (holding that *Russell* "bars plaintiffs from suing under § 502(a)(2) because plaintiffs are seeking benefits on their own behalf, not on behalf of the Plan.").

Further, the legislative history of ERISA §§ 409 and 502(a)(2) supports the position "that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole." *Russell*, 473 U.S. at 141 n.9. *See, e.g.*, 120 CONG.

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[4] Plaintiff recognizes that even if this Court agrees with the proposition that the holding in *Russell* has been misapplied or was wrongly decided, it is "powerless to overrule it." Pl.'s Mem. in Opp'n to Defs' Mot. to Dismiss at 7 n.6.

REC. H29196-97 (1974). The legislative history "makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets and with remedies that would protect the entire plan, rather than the rights of an individual beneficiary." *Russell*, 473 U.S. at 141. Plaintiff in this case seeks relief under ERISA §§ 502(a)(2) and 409 for his own benefit and not in a representative capacity on behalf of the Plan, and therefore, he fails to state a cognizable claim under ERISA § 502(a)(2).

B. Relief Available Under § 502(a)(3)

The Supreme Court and this Circuit have also provided substantial guidance with respect to Plaintiffs second claim under ERISA § 502(a)(3). ERISA § 502(a)(3) provides that a civil action may be brought

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C.A. § 1132 (West 2007).

In *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993), the Court considered whether former employees could bring suit against the plan's actuary, a non-fiduciary, who they alleged knowingly participated in the fiduciary's breach of duty under ERISA § 502(a)(3). The plaintiffs argued that the non-fiduciary was liable to the plan under ERISA § 502(a)(3)(B)

which provides for "other equitable relief." The Court found that plaintiffs did not "seek a remedy traditionally viewed as 'equitable,' such as injunction or restitution" but, instead, sought compensatory damages, nothing other than monetary relief." *Mertens*, 508 U.S. at 255. Accordingly, the Court held that ERISA § 502(a)(3) does not authorize suits for money damages against non-fiduciaries, at least not in a case like *Mertens*, and, by analogy, one might argue, to the case at bar. The Court went on to find that the term "equitable relief" as used in ERISA § 502(a)(3) refers to "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* at 256.

More recently, *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204 (2002), again considered the issue. There, the plaintiff sought reimbursement for health care expenses from the defendant after she recovered in a tort action for the same incident. Her recovery had been put in trust for her benefit. The plaintiff contended that its suit for reimbursement was equitable because it was a claim for restitution. However, the Court held that plaintiffs sought monetary relief which was not "typically available in equity." *Great-West*, 534 U.S. at 210. The Court drew a distinction between restitution in equity and restitution in law, and found that this suit fell on the legal side of the ledger.[5]

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[5] This distinction was not made in *Mertens*, whereas the Court referred to restitution as an equitable remedy. *Mertens*, 508 US. at 255 ("[Petitioners] do not . . . seek a remedy traditionally viewed as 'equitable,' such as injunction or restitution.").

Most recently, the Supreme Court had occasion to address the question of equitable relief under ERISA § 502(a)(3), in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S.Ct. 1869 (2006), a factually similar case to *Mertens*. There, a unanimous court found that the suit should proceed because the request for restitution was for identifiable funds in the defendant's possession, and therefore fell on the equity side of the ledger. *Sereboff*, 126 S.Ct. at 1874.

Here, Defendants argue that Plaintiff is foreclosed from bringing suit under ERISA § 502(a)(3)(B) because his request is one for *monetary* damages—*i.e.*, his lump sum payment—and thus, is not *equitable* relief. Plaintiff, in response, points out that other courts have failed to give due weight to the fact that *Mertens* drew a distinction between fiduciaries and non-fiduciaries in determining whether relief was "legal" or "equitable." According to Plaintiff, *Mertens* is distinguishable from the instant case because it involved a claim for compensatory damages against a non-fiduciary, and, therefore, should not be applied to this case.[6]

However, while the decisions may be interpreted to raise inconsistencies, they are as one with respect to the case at bar, *i.e.*, Fisher cannot cloak a legal claim for damages in equitable clothing. ERISA § 502(a)(3) "only allows for *equitable relief*" *Great-West*, 534 U.S. at 221 (emphasis in original).

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[6] In addition, Defendants argue that ERISA § 502(a)(3)(A) is irrelevant in this case because Plaintiff does not seek an injunction, nor would an injunction be applicable in this case because none of the named Defendants are currently fiduciaries to the Plan (because PBGC has assumed the Plan's liabilities and assets). However, Plaintiff does not request injunctive relief in this case, and, therefore the Court need not address this point.

Although Fisher requests declarations from this Court, the nature of such declarations is inherently legal. *See* Compl. at 7 (praying for a judgment (1) "declaring that defendants . . . violated his/her fiduciary duties by failing to provide him with a lump sum benefit," and (2) "declaring the amount of the lump sum benefit to which Plaintiff is entitled"). Fisher, like the plaintiffs in *Mertens* and *Great-West*, seeks "nothing other than *compensatory* damages—monetary relief for all losses [he has] sustained as a result of [Defendants'] alleged breach of fiduciary duties." *Mertens*, 508 U.S. at 255 (emphasis in original).

The Second Circuit's recent decision in *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006), is dispositive. The Court held that irrespective of the party sued, Plaintiff must still show that the relief requested is of the sort typically available at equity. *Id.* at 264 ("But whether sought from a fiduciary or not, the type of relief a plaintiff requests must still be "equitable."). In other words, although breach of fiduciary duty is an equitable claim, Plaintiff must also demonstrate that the *nature of recovery* is equitable. *Sereboff*, 126 S.Ct. at 1874. Consequently, Plaintiff has failed to state a cognizable claim under ERISA § 502(a)(3).

IV. CONCLUSION

Since what Plaintiff seeks is *individual legal relief*—in this case, monetary damages under ERISA §§ 502(a)(2) and 502(a)(3), which must be denied for the reasons stated above, the Complaint fails to state a claim, and, accordingly, the Defendants' Motion to Dismiss the Complaint is GRANTED.

The Clerk of the Court is instructed to close this matter and remove it from my docket.

IT IS SO ORDERED.

New York, New York
February 16, 2007

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U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket Number: 07-1100-cv

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 15th day of May, two thousand and nine,

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JOSEPH V. FISHER,

Plaintiff-Appellant,

—v—

THE PENN TRAFFIC COMPANY, BYRONE E. ALLUMBAUGH, RICHARD P. BRENNAN, KEVIN P. COLLINS, JAMES A. DEMME, MATTHEW GLASS, ROBERT HOCKETT, RICHARD D. HOULIHAN, JR., PETER L. ZURKOW, JOHN DOES, NOS. 1-5, BERNADETTE RANDALL-BARBER, JANE ROES, NOS. 1-5,

Defendant-Appellees.

ORDER

Appellant Joseph V. Fisher having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: _____
Frank Perez, Deputy Clerk

David S. Preminger (DP 1057)
Rosen Preminger & Bloom LLP
708 Third Avenue, Suite 1600
New York, New York 10017
(212) 682-1900

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMPLAINT
No. 06 CV 5848 (HB)
(ECF Case)

JOSEPH V. FISHER,

Plaintiff,

—against—

THE PENN TRAFFIC COMPANY, BYRON E. ALLUMBAUGH, RICHARD P. BRENNAN, KEVIN P. COLLINS, JAMES A. DEMME, MATTHEW GLASS, ROBERT HOCKETT, RICHARD D. HOLIHAN, JR., PETER L. ZURKOW, JOHN DOES NOS. 1-5, BERNADETTE RANDALL-BARBER and JANE ROES NOS. 1-5,

Defendants.

PRELIMINARY STATEMENT

1. This is an action by Plaintiff, Joseph V. Fisher, pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq.*, for breach of fiduciary duty by defendants in refusing to pay him the lump sum pension benefit to which is entitled as a participant in The Penn Traffic Company Cash Balance Pension Plan (the "Plan").

II. JURISDICTION AND VENUE

2. This action is brought by plaintiff pursuant to §§ 502(a)(2) and (a)(3) of ERISA, 29 U.S.C. §§ 1132(a)(2) and (a)(3). This Court has subject matter jurisdiction pursuant to ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1). This Court has supplemental jurisdiction over any other claim pursuant to 28 U.S.C. § 1367(a).

3. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202 and Rule 58 of the Federal Rules of Civil Procedure.

4. Venue is based on ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

III. PARTIES

5. Plaintiff, Joseph V. Fisher is a natural person residing in the state of Massachusetts.

6. Defendant The Penn Traffic Company (the "Company"), at all times pertinent hereto, was the sponsor of the Plan within the meaning of ERISA § 3(16)(B)(i), 29 U.S.C.§ 1002(16)(B)(i), the Admin-

istrator of the Plan within the meaning of ERISA § 3(16)(A)(i), 29 U.S.C. § 1002(16)(A)(i), and the Named Fiduciary of the Plan within the meaning of ERISA § 402(a)(2), 29 U.S.C. § 1102(a)(2). As such, at all times pertinent hereto, the Company was a fiduciary within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(3)(21)(A).

7. Defendants Byron E. Allumbaugh, Richard P. Brennan, Kevin P. Collins, James A. Demme, Matthew Glass, Robert Hockett, Richard D. Holihan, Jr., Peter L. Zurkow, and John Does Nos. 1-5 (whose names are currently unknown to Plaintiff) were, at all times pertinent hereto, members of the Board of Directors of the Company (the "Board"). These members of the Board acted in a fiduciary capacity with respect to Plaintiff's application for benefits at issue herein and, therefore, acted as fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(3)(21)(A).

8. Defendants Bernadette Randall-Barber and Jane Roes Nos. 1-5 (whose names are currently unknown to Plaintiff) were, at all times pertinent hereto, members of the Administration Committee of the Plan (the "Committee"). The Plan delegates to the members of the Committee certain powers and duties, *inter alia*, exclusive authority to decide claims for benefits, including the amount of benefits, and interpretation of the Plan's terms. As such, the members of the Committee were at all times pertinent hereto fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(3)(21)(A).

IV. FACTS

9. Plaintiff is a former employee of the Company. having resigned in early August, 2003. Plaintiff is and, at all times pertinent hereto, was a participant in and beneficiary of the Plan within the meaning of ERISA §§ 3(7), (8), 29 U.S.C. §§ 1002(7), (8), with a vested right to benefits from the Plan.

10. Pursuant to the provisions of the Plan, Plaintiff filed an application for benefits on August 15, 2003, on the form provided by the Plan for that purpose and checked the box on that form indicating that he was electing that his benefits be paid in the form of a lump sum, a form of benefit offered by the Plan.

11. By letter dated October 17, 2003 (the "Denial Letter"), the Committee informed Plaintiff that his application for a lump sum was denied but indicated that payments in the form of a monthly annuity would commence should Plaintiff so elect. Plaintiff did not so elect.

12. The Denial Letter failed to comply with the requirements of 29 C.F.R. § 2960.503-1(g), (h).

13. Despite the fact that the Committee had sole authority under the Plan to make benefit determinations, it did not do so here. The decision to deny Plaintiff's application was made by the Board and adopted by the Committee.

14. If the Committee purports to have delegated authority to the Board to make this decision, any such delegation was not, upon information and belief, effected in conformance with the Plan's procedures for delegation of fiduciary responsibilities.

15. By timely letter from counsel dated November 3, 2003, supplemented by letter from counsel dated November 17, 2003, Plaintiff appealed the denial of a lump sum benefit.

16. No response was ever provided to Plaintiff with respect to his appeal.

17. While it is Plaintiff's position that exhaustion of the Plan's claims procedures was not required with respect to the claims Plaintiff asserts herein, Plaintiff has both exhausted the Plan's claims procedures in fact and is deemed to have exhausted those procedures (29 C.F.R. § 2560.503-1(*l*)).

V. CLAIMS FOR RELIEF

First Claim for Relief (ERISA §§ 404(a)(1) and 502(a)(2), 29 U.S.C. §§ 1104(a)(1) and 1132(a)(2))

18. Plaintiff repeats and realleges the contents of paragraphs 1-17 above as if fully set forth herein.

19. Typically, the Plan paid lump sum benefits within two (2) weeks of the filing of an application by a participant.

20. At the time Plaintiff applied for benefits, the Plan was underfunded and the Company had been informed that, at some point in the future, it might want to terminate the Plan in a distress termination so that the Pension Benefit Insurance Company ("PBGC") would assume the Plan's assets and liabilities.

21. Nonetheless, the Plan had adequate resources to pay Plaintiff his lump sum benefit.

22. At its meeting on September 29, 2003, the Board passed a resolution to terminate the Plan.

23. Nonetheless, the Committee processed other Plan participants' applications for benefits, including lump sum benefits, and caused the Plan to pay such benefits, both before and after the Board's decision to terminate the Plan.

24. Upon the filing of an application for a distress termination, the PBGC does not immediately assume responsibility for a plan. Typically there are negotiations and even litigation over issues including the appropriate date of termination. Often, the PBGC pursues a claim against a plan sponsor for a plan's unfunded liability.

25. Because the Plan's assets and liabilities have now been assumed by the PBGC, which is prohibited by statute from paying benefits in the form of a lump sum even if a plan provides for such a benefit payment, Plaintiff can not receive the lump sum benefit to which he is entitled and may receive a lower annuity than provided for by the terms of the Plan if Plaintiff's annuity is in excess of PBGC limits.

26. Accordingly, defendants, and each of them, violated their fiduciary duties under ERISA, inter *alia*, in the following respects:

a. the Committee failed to act on Plaintiff's application on a timely basis in accordance with past practice and the terms of the Plan;

b. the members of the Committee failed to resign and continued to process the pension applications of other Plan participants while Plaintiff's application was held in abeyance pending a decision by the Board;

c. the Company (including the Board) failed to remove the members of the Committee for refusing/failing to act on Plaintiff's application;

d. the Committee *de facto* improperly delegated its authority to determine Plaintiff's application to the Board;

e. the Board accepted the Committee's *de facto* improper delegation of its authority to determine Plaintiff's application;

f. the Board refused/failed to act on Plaintiff's application until after its September 29, 2006 decision to terminate the Plan.

27. Upon information and belief, defendants' foregoing actions were all effected in order to protect the Company's financial position rather than providing Plaintiff with the benefit to which he was entitled and thus constitute breaches of their fiduciary duties *inter alia* under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), which requires fiduciaries to "discharge [their] duties solely in the interest of the participants and beneficiaries."

28. As such, pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), Plaintiff is entitled to appropriate equitable or remedial relief for defendants' breaches of fiduciary duty.

Second Claim for Relief
(ERISA §§ 404(a)(1) and 502(a)(3), 29 U.S.C. §§ 1104(a)(1) and 1132(a)(3))

29. Plaintiff repeats and realleges the contents of paragraphs 1-27 above as if fully set forth herein.

30. Plaintiff has no adequate remedy at law.

31. Alternatively, pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiff is entitled to appropriate equitable relief for defendants' breaches of fiduciary duty.

Third Claim for Relief
(ERISA §§ 406(b)(1), (2) and 502(a)(2), (3) 29 U.S.C. §§ 1106(b)(1), (2) and 1132(a)(2), (3))

32. Plaintiff repeats and realleges the contents of paragraphs 1-27 and 29-30 above as if fully set forth herein.

32. In violation of ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1), the Company (including the Board) engaged in a prohibited transaction by acting "deal[ing] with the assets of the [P]lan in [its] own interest or for [its] own account."

33. In violation of ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2), defendants engaged in a prohibited transaction by acting "in [a] transaction involving the [P]lan on behalf of a party (the Company) whose interests are adverse to the interests of the [P]lan['s] participants and beneficiaries."

34. As such, pursuant to ERISA §§ 502(a)(2), (3), 29 U.S.C. §§ 1132(a)(2), Plaintiff is entitled to appropriate equitable or remedial relief for defendants' breaches of fiduciary duty.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court enter judgment in his favor as follows:

1. declaring that defendants, and each of them, violated his/her fiduciary duties by failing to provide him with a lump sum benefit;

2. declaring the amount of the lump sum benefit to which Plaintiff is entitled;

3. granting Plaintiff judgment against the defendants, jointly and severally, for the amount of his lump sum benefit together with appropriate interest thereon;

4. awarding Plaintiff his costs and attorney's fees herein; and,

5. awarding Plaintiff such other and further relief as to this Court may seem just and proper.

Dated: July 31, 2006
New York NY

Respectfully submitted,

Rosen Preminger & Bloom LLP
Attorneys for Plaintiff

By: _____

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 06 CV 5848 (HB)
(ECF CASE)

JOSEPH V. FISHER,

Plaintiff,

—against—

THE PENN TRAFFIC COMPANY, BYRON E. ALLUMBAUGH, RICHARD P. BRENNAN, KEVIN P. COLLINS, JAMES A. DEMME, MATTHEW GLASS, ROBERT HOCKETT, RICHARD D. HOLIHAN, JR., PETER L. ZURKOW, JOHN DOES NOS. 1-5, BERNADETTE RANDALL-BARBER and JANE ROES NOS. 1-5,

Defendants.

NOTICE OF MOTION

Please take notice that Defendants The Penn Traffic Company, Byron E. Allumbaugh, Richard P. Brennan, Kevin P. Collins, James A. Demme, Matthew Glass, Robert Hockett, Richard D. Holihan, Jr., Peter L. Zurkow, and Bernadetter Randall-Barber Myer hereby move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss Plaintiff

Joseph V. Fisher's Complaint with prejudice. This motion is made on the grounds that the Complaint fails to state a claim upon which relief can be granted, and is based upon this motion and the Memorandum of Law filed in support thereof.

Respectfully submitted,

COOLEY GODWARD KRONISH LLP

By: /s/ WILLIAM H. O'BRIEN
William H. O'Brien (WB 5271)
Jeffrey W. Lang (JL 6021)

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